STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED September 27, 2002
v JOSEPH EDMUND PUERTAS, Defendant-Appellant/Cross-Appellee.	No. 224173 Oakland Circuit Court LC No. 98-157485-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee/Cross-Appellant,	
v JAMES MICHAEL TALLEY, Defendant-Appellant/Cross-Appellee.	No. 224286 Oakland Circuit Court LC No. 98-157489-FH

Before: Whitbeck, P.J., and Holbrook, Jr., and Zahra, JJ.

WHITBECK, P.J. (*concurring*).

I concur in the result the majority reaches in this case. I also agree with the reasoning the majority used in concluding that the trial court should have instructed the jury pursuant to CJI 2d 4.14, but its failure to do so was not error requiring reversal, and that Michigan continues to adhere to the bilateral conspiracy rule as explained in *People v Anderson*.[1] I write separately to explain two features of this case that, in my view, require further attention.

First, the expert scientific evidence concerning how and why the drug dogs alerted plainly would have passed the test the United States Supreme Court articulated in *Daubert v*

[1] *People v Anderson*, 418 Mich 31, 35; 340 NW2d 634 (1983).

Merrell Dow Pharmaceuticals, Inc.[2] However, Michigan does not use the *Daubert* test. Rather, as the majority notes, Michigan applies the "general acceptance" test[3] stated in *People v Davis*[4] and *Frye v United States*,[5] which is designed to make only scientific evidence with a trustworthy basis admissible.[6] In some instances, a valid argument can be made that the *Davis-Frye* test has failed to keep pace with the significant growth and change in the sciences over the last half-century, which *Daubert* largely accommodates. Nevertheless, the differences between the language used in MRE 702 and FRE 702, the rules respectively governing scientific evidence in Michigan's courts and the federal courts, presently justify using the *Davis-Frye* rule in Michigan. More accurately, this textual difference supports the distinct evidentiary tests until the Michigan Supreme Court changes MRE 702 or directs us to interpret it differently.[7]

In my view, the record is not particularly clear with respect to whether the evidence passed the *Davis-Frye* test. As a matter entrusted to the trial court's discretion,[8] I am hesitant to say that the trial court, which acknowledged the *Davis-Frye* standard in its ruling, committed error requiring reversal. Rather, I note that *Davis-Frye* requires more than the casual appearance that the evidence has some relationship to scientific principles for it to be admissible. I also suggest that, despite the reasoning in *United States v U S Currency, $22,474*,[9] Judge Neff's concurrence in *People v Humphreys*[10] raises important questions regarding the evidence used in this case because of the logical relationship between the drug residue necessary to emit the chemicals the dogs detect. In other words, while a dog may only alert to chemicals emitted by cocaine, and not the cocaine itself, the widespread contamination of American currency may very well affect when these particular chemicals are also present, thereby diminishing the value of the alert as evidence that drugs had once been present in that place.

I also have concerns regarding the alleged police corruption in this case. I completely agree that, as the majority recognizes, this Court has an obligation to address the technical, legal grounds governing whether the prosecutor's failure to give the State Police report following the inquiry into the alleged corruption to the defense was an error requiring a new trial. With respect to those technical questions, I agree that the rule articulated in *Brady v Maryland*[11] has not

[2] *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

[3] *People v McMillan*, 213 Mich App 134, 136; 539 NW2d 553 (1995), citing *People v Young (After Remand)*, 425 Mich 470, 473, 479-480; 391 NW2d 270 (1986).

[4] *People v Davis*, 343 Mich 348, 372; 72 NW2d 269 (1955).

[5] *Frye v United States*, 54 US App DC 46, 47; 293 F 1013 (1923).

[6] *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 491; 566 NW2d 672 (1997).

[7] *McMillan, supra* at 137, n 2.

[8] See *People v Bahoda*, 448 Mich 261, 288-289; 531 NW2d 659 (1995).

[9] *United States v U S Currency, $22,474*, 246 F3d 1212, 1216 (CA 9, 2001).

[10] *People v Humphreys*, 221 Mich App 443, 453-454; 561 NW2d 868 (1997) (Neff, J., concurring).

[11] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

evolved to the point that would breach the wall[12] between the investigation into the criminal wrongdoing of Joseph Puertas and James Talley and the State Police investigation. Thus, the majority correctly concludes that the prosecutor did not commit a *Brady* violation by failing to share the information about the report the State Police generated as part of the police corruption investigation. There is a good argument to be made that the trial court would have acted within its discretion if it had imposed a lesser sanction for the failure to provide the State Police report pursuant to the discovery order. However, to the extent that the discovery order did not explicitly govern the product of this other investigation, Puertas and Talley knew about the State Police report, and they did not establish that they had exhausted other means of acquiring the report, a new trial was too severe a sanction to order in this case.

Nevertheless, in focusing on these technical questions, one cannot ignore the substance of the controversy that the report represents and, to some degree, records. In my view, the information in the State Police report favorable to the prosecutor in this case did not nullify the effect the report had in casting the prosecutor's case in a poor light. Instead, it raised more questions than it answered.

I accept as a basic premise that, to carry out their legitimate role in law enforcement, officers must often work with people who, at best, lack a moral compass, and, at worst, are indistinguishable from the criminals under investigation. The law anticipates these pragmatic alliances. However, it cannot be emphasized too much that the law, as accommodating as it may be, still expects that even close and lengthy dealings with criminals will not diminish the integrity of officers; the officers act as an indispensable check against whatever impulse to act improperly might spring up in an informant. As a result, it is not the fact that Joe Sweeney worked as an informant in this case that disturbs me, even though his volunteerism appears to have been first motivated by a hard-to-believe altruistic inclination to help his brother "work off" drug possession charges. Rather, it disturbs me greatly that Deputy Ken Everingham, the law enforcement officer designated to ensure that Sweeney acted properly in the controlled buys at the Megabowl, admitted to lying at the preliminary examination in this case when he said that he was present during certain controlled purchases. Equally disturbing is Everingham's claim that Sergeant Kenneth Quisenberry instructed him and another officer to falsify their reports concerning the Megabowl investigation and to submit time logs to suggest that they had been working the case when they were not actually present. It is also disturbing to learn that Everingham purportedly paid Sweeney for transactions he never observed, and that other law enforcement agents had sincere doubts about Sweeney's trustworthiness, especially when conducting unobserved controlled buys.

Without a doubt, the State Police took the correct action in investigating this alleged malfeasance by the investigators involved in the Megabowl case. Ultimately, the officer in charge of the State Police corruption investigation concluded that there was an insufficient basis to substantiate Everingham's allegations. However, as with a jury verdict of acquittal, the

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[12] It bears mentioning that members of the prosecutor's office in this case played more than a passive role in the State Police investigation, when they consulted and shared information with the State Police.

investigating officer's conclusion was not equivalent to a factual determination that Quisenberry, Sweeney, Everingham, and the rest were actually innocent of misconduct.

In the end, one particular comment mentioned in the State Police report provides a meaningful glimpse into the reason why the result in this case, though necessary, is a difficult one to reach. According to an officer who had worked with Detective Sergeant Gary Miller, the officer who assisted Quisenberry in investigating Puertas and Talley, Miller had said, "judges expect police officers to lie" when urging this other officer to "flower up" an affidavit for a warrant. Whether Miller actually said this is irrelevant. The point is that judges explicitly rely on police officers and others who work on behalf of the law *not to lie*. True, a healthy skepticism helps when deciding any factual matter. Still, should the day ever dawn when judges routinely expect officers to lie, then our criminal justice system, as challenged as it may be at times, will truly be in great difficulty.

/s/ William C. Whitbeck